128 (34) (32)

Nos. 07-984 & 07-990

Supreme Court, U.S.
FILED
MAY 15 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

COEUR ALASKA, INC.,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, et al.,

Respondents.

STATE OF ALASKA,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER STATE OF ALASKA

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SUPPLEMENTAL BRIEF FOR PETITIONER STATE OF ALASKA

INTRODUCTION

The answer to both the Court's hypothetical questions is "no." First, the Corps acted in accordance with law when it issued its permits, regardless

of any later determination of the legal status of the future slurry discharges under Sections 301 and 306 of the CWA. That is because Section 404 is the only relevant statutory provision that governed the Corps' permitting action. And the Corps complied with every provision of Section 404 and the only regulations that apply under it, in accordance with EPA's authoritative interpretation of its own effluent limitations. Second, as all parties have agreed, a given discharge is subject to permitting either by the Corps under Section 404 (subject to a potential EPA veto) or by EPA under Section 402, but never by both agencies. *See* 33 U.S.C. § 1342(a) (EPA permitting authority applies only "[e]xcept as provided in * * * [Section 404]"). Where, as here, the discharge is of fill material, it is subject to the exclusive permitting authority of the Corps under Section 404.

It would therefore be possible for the Court to uphold the Corps' permits without deciding whether EPA effluent limitations would, or would not, apply to Coeur's future discharges. The State of Alaska, however, urges the Court to resolve the legality of the discharges in this case, and to do so by holding that EPA effluent limitations do not apply to discharges of fill material. Upholding the Corps' permits without determining whether the discharges are permissible under the CWA would subject the parties, and others in similar circumstances, to legal uncertainty that the permitting process was intended to resolve. Thus, for largely the same reasons that the Corps' permits are valid, the Court should reject the premise of the first hypothetical question and hold that the future discharges would not violate Sections 301 or 306 of the CWA.

I. THE CORPS ACTED IN ACCORDANCE WITH LAW.

As explained in its previous briefs, Alaska disagrees with the premise of the first hypothetical question, which assumes for the sake of argument that future discharges would violate Section 301 or Section 306 of the CWA. Alaska urges the Court to hold that the discharges would not violate the CWA, which would provide legal certainty to this project and to others in similar circumstances. It is, however, possible for the Court to decide this case without reaching that issue, because the Corps acted fully in accordance with law regardless of the legal status of the future discharges under statutory provisions that Congress did not direct the Corps to consider, enforce or administer.

A. It Would Be Possible For The Court To Uphold The Corps' Permits Without Deciding The Legal Status Of The Future Discharges.

As the Court's first question indicates, the issue in this case is whether the Corps acted "in accordance with law" in issuing the permits at issue. 5 U.S.C. § 706(2)(A).[1] The Corps acted lawfully, regardless of any future determination of the legal status of Coeur's discharges under Sections 301 or 306, because the Corps fully complied with each and every requirement that governed its permitting

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[1] The question also refers to the Record of Decision ("ROD") issued by the Forest Service. Because the Corps applied the ROD in its permitting decision, JA342a, this brief refers only to the permits as encompassing all relevant final agency action being challenged. SEACC has not separately challenged the ROD before this Court.

decision under Section 404 of the CWA. Given that the statutory requirements circumscribing the Corps' permitting actions—unlike those governing EPA permitting under Section 402—do not include evaluation or application of EPA effluent limitations promulgated under Sections 301 or 306, the Corps' permits are fully in accordance with law.

The discharge at issue is conceded by all parties to be "fill material" under the applicable regulatory definition. *See* Alaska Reply Br. 3; SEACC Br. 20. Accordingly, Section 404 is the CWA provision that governed the Corps' permitting decision. Section 404 provides that the Corps "may issue permits, after notice and opportunity for public hearings for the discharge of * * * fill material." 33 U.S.C. § 1344(a). The only other statutory requirements for such permits are set forth in the remainder of Section 404. As relevant here, those provisions require the Corps to evaluate disposal sites "through the application of guidelines developed by [EPA], in conjunction with the [Corps]." 33 U.S.C. § 1344(b). Such permitting, however, is always subject to veto by EPA if it determines that the discharge "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." 33 U.S.C. § 1344(c).

Notably absent from Section 404 is any requirement that the Corps apply effluent limitations promulgated by EPA under Sections 301 or 306. This is in marked contrast with Section 402, which governs EPA permits for pollutants other than dredged or fill material and which prohibits EPA from issuing such permits unless the discharges would comply with effluent limitations. *See* 33

U.S.C. § 1342(a). Thus, even SEACC agrees that "Congress did not authorize the Corps to issue section 404 permits incorporating effluent limitations under sections 306 or 301." SEACC Br. 37. *See also* Oral Argument Tr. 35 (statement by SEACC's counsel that "the Corps of Engineers just doesn't have the tools available to apply effluent limitations in its 404 permits, except for toxic substances").

Indeed, in CWA § 307(a)(5), Congress specifically provided that one specific type of EPA effluent limitations—governing toxic pollutants not at issue here—"may" (but not must) be applied to discharges of dredged material after consultation with the Corps. *See* 33 U.S.C. § 1317(a)(5). This specific authority demonstrates that Congress did not intend that *all* effluent limitations will automatically apply to all discharges of fill material governed by the Corps under Section 404, even when the CWA provides, generally, that operation of a source in violation of the standards is unlawful. *Compare* 33 U.S.C. § 1316(e) *with* 33 U.S.C. § 1317(d) (nearly identical prohibitions on violation of effluent standards).

"[A]n agency is not automatically given 'either the duty or the authority to execute numerous other laws,'" and "an agency's general duty to enforce the public interest *does not require it to assume responsibility for enforcing legislation that is not directed at the agency.*" *Community Television of S. Cal.* v. *Gottfried*, 459 U.S. 498, 509 n.14, 510 n.17 (1983) (quoting *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79 (1944)) (emphasis added). In *Community Television*, a petitioner challenged an FCC television license renewal, alleging that the licensee would operate in violation of Section 504 of

the Rehabilitation Act by failing to accommodate the needs of deaf or hearing impaired viewers. The Court, however, upheld the renewal on the ground that, while the FCC should consider the needs of handicapped citizens, it "is by no means required to measure proposals for public television license renewals by the standards of § 504 of the Rehabilitation Act." 459 U.S. at 509 n.14. The Court did not need to decide, and did not decide, whether the licensee would in fact violate the Act.

In *McLean Trucking*, the Court similarly held that the Interstate Commerce Commission did not act unlawfully in approving a consolidation of motor carriers, notwithstanding unresolved allegations that the order authorized a violation of the Sherman Act. As the Court held, "the Commission has no power to enforce the Sherman Act as such" and "cannot decide definitely whether the transaction contemplated constitutes a restraint of trade or an attempt to monopolize which is forbidden by that Act." 321 U.S. at 79. Rather, the Commission's discretionary ability to consider antitrust policies "depend[s] on the extent to which Congress indicates a desire to have those policies leavened or implemented in the enforcement of the various specific provisions of the legislation with which the Commission is primarily and directly concerned." *Id.* at 80.

Likewise, in *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 647 (1990), the Court held that the PBGC did not act unlawfully when it did not consider labor and bankruptcy laws in implementing the pension laws that the PBGC was entrusted to enforce. As the Court held, "there are numerous federal statutes that could be said to embody countless policies" and "[i]f agency action may be

disturbed whenever a reviewing court is able to point to an arguably relevant statutory policy that was not explicitly considered, then a very large number of agency decisions might be open to judicial invalidation." *Id.* at 646. *See also NAACP* v. *FPC*, 425 U.S. 662, 671 (1976) (Federal Power Commission's authority to consider the "public interest" did not require it to enforce non-discriminatory employment practices by its licensees).

Under these precedents, a court cannot invalidate a Section 404 permit issued by the Corps as contrary to law on the ground that an applicant might subsequently violate another statute that the Corps does not enforce and that does not constrain the Corps' actions. For example, the Corps would not act unlawfully if it did not investigate whether every prospective permittee might violate minimum wage laws and then deny a permit whenever it believed a violation might later occur. The Corps need only follow the statutes that circumscribe its own actions. Here, that statute is Section 404, and it does not incorporate or require adherence to the EPA effluent limitations at issue here. Indeed, the case for upholding the Corps' actions is even stronger than it was in *Community Television*, *McLean Trucking*, and *NAACP*, because the agencies in those cases were at least subject to broad statutory public interest standards whereas the Corps is subject only to the specific standards of Section 404 and the guidelines promulgated under it.

The Corps thus acted fully in accordance with law when it carried out all its duties and responsibilities under Section 404, regardless of whether Sections 301 and 306 would, or would not, apply to future discharges. Those provisions are simply not among

the ones that Congress directed the Corps to apply or enforce. Rather, they are administered by a different agency—EPA—and EPA authoritatively informed the Corps in the context of this permitting decision that EPA's own "effluent limitations guidelines and standards, such as those applicable to gold ore mining (*see* 40 C.F.R. Part 440, Subpart J) *do not apply* to the placement of tailings into the proposed impoundment." J.A. 144a-45a (emphasis added). This statement, moreover, was consistent with EPA's longstanding recognition that it has that "*never* sought to regulate fill material under effluent guidelines." 67 Fed. Reg. 31,129, 31,135 (2002) (emphasis added). Regardless of whether EPA's interpretation of its regulations was correct, or whether EPA might adopt a different view in future permitting decisions, it is the Corps, not EPA, that is the defendant in this action and only the Corps' actions are subject to challenge. The Corps did not act unlawfully when it faithfully followed every statutory requirement that governed its actions and accepted EPA's authoritative interpretation of the regulations that it alone wrote and administers.

To be sure, an agency is bound to follow not only its governing organic statute but also any other law that "circumscribes [the agency's] permissible action." *FCC* v. *NextWave Pers. Communic'ns, Inc.*, 537 U.S. 293, 304 (2003). That would include, for example, laws such as the Administrative Procedure Act itself, the National Environmental Policy Act, and constitutional provisions that constrain government action. But for the reasons noted above and in Alaska's prior briefs, EPA effluent limitations promulgated under Sections 301 and 306 do not circumscribe the Corps' permitting actions under

Section 404, which are governed instead by the requirements of that statute.

Moreover, as the cited precedents make clear, even where an agency is not *required* to consider alleged violations of other statutes in carrying out its own duties, it still may have the *discretion* to consider the policies underlying those other statutes. *See, e.g., McLean Trucking*, 321 U.S. at 80. Thus, as noted previously (*see* Alaska Br. 29 n.6), while the Corps is not required by statute to apply EPA effluent limitations to its permitting actions, the Corps and EPA would have the future discretion to incorporate effluent limitations, where appropriate, into their Section 404(b)(1) Guidelines. *Cf. Community Television*, 459 U.S. at 510 (in renewing licenses, FCC should consider "possible relevance" of violations previously adjudicated in different proceedings). Indeed, the agencies did just that with respect to toxic effluent limitations, even though EPA never exercised its authority under CWA § 307(a)(5) to apply those limitations directly to dredged material. 40 C.F.R. § 230.10(b)(2); 44 Fed. Reg. 54,222, 54,235 (1979). And the agencies also similarly exercised their discretion to incorporate certain provisions of the Endangered Species Act into the Section 404(b)(1) Guidelines. 40 C.F.R. § 230.10(b)(3). But to date, they have never made other effluent limitations applicable as part of the Section 404(b)(1) Guidelines.

For these reasons, the Court could uphold the Corps' permits without reaching the question of whether Sections 301 or 306—which do not govern the Corps' permitting authority—would or would not apply to the subsequent discharges.

B. The Court Should Hold That Effluent Limitations Do Not Apply To Discharges Of Fill Material.

Although it would be possible for the Court to decide this case in favor of petitioners without deciding the legal status of Coeur's subsequent discharges, Alaska nevertheless urges the Court to decide that latter issue, and to do so by holding that the discharges are not subject to EPA effluent limitations promulgated under Sections 301 and 306. Leaving that issue open would perpetuate much of the legal uncertainty that currently plagues the Kensington Mine project and other projects facing similar circumstances.

If the Court upholds Coeur's permits without deciding whether subsequent discharges would violate Section 301 or 306 effluent limitations, that holding likely would not end this dispute. SEACC (or another prospective plaintiff) might try to relitigate that issue by challenging the discharges in a separate action brought under the "citizen suit" provision of 33 U.S.C. § 1365(a)(1). *See* SEACC Br. 35. A court in such an action would then have to determine whether the suit is authorized, including whether it would be barred by the "permit shield" provision of 33 U.S.C. § 1344(p). *See* Alaska Br. 32; Alaska Reply Br. 9 n.6. If the court nevertheless found the lawsuit proper, it would then likely proceed to decide whether the discharges would "violate" an "applicable" standard of performance promulgated under Section 306. *See* 33 U.S.C. § 1316(e).[2]

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[2] As noted below, there would be no conceivable basis for invoking Section 301 effluent limitations because this case does not involve an existing source.

If that subsequent litigation occurs, the Kensington project would remain in legal limbo, leaving both Coeur Alaska and the citizens of Alaska unsure as to whether the approved tailings disposal method—upon which the entire project is based—will ultimately be permissible. A main purpose of permitting schemes, like the one set forth in Section 404, is to remove such legal uncertainty and thereby provide the permittee and the public, whenever possible, with advance legal assurance. Alaska thus urges the Court to provide such assurance in this case to the extent it can. The Kensington project has been under study for almost two decades, and this litigation has already consumed four years. The prospect of yet more uncertain litigation would not be a welcome one for any of the parties.

In Alaska's view, it is not necessary to reserve the issue, because the same reasoning that underlies the Corps' lack of authority to enforce or administer EPA effluent limitations leads to the conclusion that those limitations do not apply to discharges of fill material. As explained previously, nothing in the language of Sections 301 or 306 mandates such application. Section 301(e) simply requires that effluent limitations for existing sources be applied "in accordance with the provisions of [the CWA]," 33 U.S.C. § 1311(e), yet nothing in the CWA requires that these limitations be applied to fill material. *See* Alaska Br. 33. In any event, effluent limitations promulgated under Section 301 apply only to existing sources. 69 Fed. Reg. 68,444, 68,476 (2004) ("[e]ffluent limitations guidelines for existing facilities are established under sections 301 and 304, whereas new source performance standards are established under section 306"). And because the Kensington mine would be a new source, not an existing one, *see* 40

C.F.R. § 122.2, Section 301 effluent limitations could not conceivably apply to this project.

Section 306(e) similarly provides only that a discharge may not be in "violation" of any "applicable" standard of performance promulgated thereunder. It, too, says nothing about whether such standards of performance are in fact applicable to, or could be violated by, discharges of fill material permitted by the Corps under Section 404. *See* Alaska Br. 33-34; Alaska Reply Br. 4.

When Congress wants to authorize the application of EPA effluent limitations to discharges that are otherwise exempt from them, it says so expressly. As noted, Congress expressly provided that the Corps may (but not must) apply toxic effluent limitations to dredged (but not fill) material. *See* 33 U.S.C. § 1317(a)(5). And Congress expressly amended CWA § 318, which—like Section 404—governs discharges excepted from Section 402 permitting, to require application of all EPA effluent limitations. But Congress never amended Section 404 in the same manner. *See* Alaska Br. 28; Alaska Reply 5-6.

Even if the statutes were not clear on this point, the agencies' reasonable interpretations are dispositive. In the first place, Section 306(e) does not apply solely of its own force. Rather, it merely prohibits discharges that would violate applicable *regulations* promulgated by EPA. Yet EPA has stated definitively that its *own* effluent limitations are not applicable to, and thus would not be violated by, the proposed discharges of fill material. *See* J.A. 144a-45a; 67 Fed. Reg. at 31,135; 40 C.F.R. § 122.3(b). Therefore, Section 306(e) cannot apply to this case as a matter of law because the agency with the sole authority to determine when it applies has

said that it does not. Alaska Br. 34; Alaska Reply Br. 8. In any event, the agencies' interpretation is entitled to dispositive deference under *Chevron*. *See* Alaska Br. 41-49; Alaska Reply Br. 11-14.

It is inconceivable that Congress, when it established a separate permitting scheme under Section 404 that does not require the Corps to follow EPA effluent limitations, nevertheless intended for those limitations to apply to, and prohibit, future discharges that are in full compliance with a valid Section 404 permit. Rather, the only intelligible interpretation of the statute is the one the agencies have always embraced: discharges of fill material permitted by the Corps need not comply with effluent limitations promulgated by EPA under Sections 301 and 306.

II. ALL DISCHARGES OF FILL MATERIAL ARE SUBJECT TO THE EXCLUSIVE PERMITTING AUTHORITY OF THE CORPS UNDER SECTION 404.

A. A Discharge Is Subject To Only One Permitting Scheme.

In answer to the Court's second question, if a discharge satisfies the definition of fill material, the discharger may not obtain permits under both Sections 402 and 404, but rather may (and must) obtain only a Section 404 permit from the Corps. The parties have disagreed on much in this litigation, but they have always agreed on one point: a given discharge is subject either to a Section 402 permit from EPA or a Section 404 permit from the Corps, but never both. *See* Alaska Br. 25. SEACC has conceded that point at every stage of the proceedings, from the District Court through oral

argument in this Court.[3] The parties have disagreed on *which* agency must consider this permit, but they have always agreed that only one can do so.

1. It is not surprising that SEACC has always conceded the point, because the statute, the legislative history, and the agencies' unwavering interpretations mandate it. Section 404 provides, in pertinent part, that the Corps "may issue permits * * * for the discharge of dredged or fill material into the navigable waters" under the Section 404(b)(1) Guidelines. 33 U.S.C. § 1344(a), (b)(1). By contrast, Section 402 provides, in pertinent part, that

> *[e]xcept as provided in section[] * * * 1344 of this title* [Section 404 of the CWA], the Administrator [of EPA] may * * * issue a permit for the discharge of any pollutant, or combination of pollutants * * * upon condition that such discharge will meet * * * all applicable

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[3] *See* Oral Arg. Tr. 27 ("[I]f you have a section 404 permit, you don't also need a section 402 permit."); SEACC Br. 7 ("If a discharge is authorized by a valid fill-material permit under section 404, a section 402 permit is not required"); SEACC Opp. Cert. 20 ("[D]ischarges subject to EPA effluent limitations may be permitted by EPA under section 402 but not by the Corps under section 404. Conversely, discharges properly permitted under section 404 do not require section 402 permits."); SEACC Ninth Cir. Reply Br. 2 ("a properly permitted discharge of dredged or fill material under section 404 does not also require a permit under section 402") (R. 54), *id.* at 3 n.2 ("a single discharge is subject to only one of these permitting programs"); SEACC Ninth Cir. Br. 24 ("a single discharge will be governed by either section 402 or section 404, but not both") (R. 28), Plaintiffs' Reply Br. on Count I at 4, No. 05-cv-00012 (D. Alas. May 18, 2006) ("[s]ection 402(a)(1) expressly excepts discharges authorized by permits under section 404 from also getting authorization under section 402") (R. 104).

> requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title.

33 U.S.C. § 1342(a) (emphasis added).

By Section 402's plain language, EPA may issue a permit for the discharge of a pollutant *"[e]xcept as provided in section [404],"* *i.e.*, only if the discharge is not subject to permitting by the Corps under Section 404. Because the discharges at issue are concededly of "fill material," they are subject to the Corps' exclusive permitting authority under Section 404, and are not subject to EPA's authority under Section 402. There is no other reasonable reading of Section 402: the first clause would be meaningless if EPA could issue a Section 402 permit for a discharge of fill material that is subject to a Section 404 permit. Thus, in *Rapanos* v. *United States*, 547 U.S. 715 (2006), a majority of the Court expressly recognized this basic division of permitting responsibilities. *See id.* at 744-45 (Section 404 is a "separate permitting program" from Section 402) (plurality); *id.* at 760 (*"[a]part from dredged or fill material*, pollutant discharges require a permit from the Environmental Protection Agency") (Kennedy, J., concurring) (emphasis added).

2. Although the statute is unambiguous on this point, the legislative history also confirms it. The division between the Section 402 and 404 programs was the result of a compromise between the House and the Senate. The initial Senate bill placed *all* discharges—including of dredged and fill material—under EPA's Section 402 permitting authority, including its effluent limitations. *See* S. 2770, 92nd Cong. § 402 (as reported by S. Pub. Works Comm., Oct. 28, 1971). It was later amended to involve the Corps in the EPA permitting process for discharges of dredged material but primary authority remained

with EPA. *See* 117 Cong. Rec. S38856, S38883 (1971); S. Rep. No. 92-414, at 71 (1971). On the other hand, the House bill contained Section 404, which gave the Corps sole authority over dredged or fill material, subject to only minimal input from EPA. *See* 118 Cong. Rec. 10632 (1972).

Congress resolved the disparity in conference. The conference substitute, which became the CWA, adopted the House bill as modified by an EPA suggestion. *See* Alaska Br. 38-40. Section 404 remained the sole authorization for permitting discharges of dredged and fill material. However, Section 404 gives EPA the power to promulgate the Section 404(b)(1) Guidelines under which potential fill material discharges are reviewed, and it gives EPA the power to veto or restrict any permit granted by the Corps. 33 U.S.C. § 1344(c).

3. In light of the statutory language and history, it is no surprise that the agencies tasked with interpreting the CWA have consistently recognized, since the Act's inception, that only one permit is required for a particular discharge. In 1973, EPA promulgated a regulation, after notice and comment, providing that "[d]redged or fill material discharged into navigable waters" does "*not require an NPDES [i.e., Section 402] permit.*" 38 Fed. Reg. 13,528, 13,530 (1973) (codified at 40 C.F.R. § 125.4(d) (1973)) (emphasis added). That regulation remains today, in virtually identical form. *See* 40 C.F.R. § 122.3(b).

In 1986, the Corps and EPA adopted a Memorandum of Agreement ("MOA") governing the process by which the agencies would determine whether a discharge was "fill material" regulated by the Corps under Section 404, or other material regulated by EPA under Section 402. 51 Fed. Reg. 8,871 (1986).

The MOA recognized that a prospective discharge must be permitted under either Section 402 or 404, but not both. *Id.* at 8,872 (1986) ("EPA * * * ha[s] been vested with authority to permit discharges of pollutants, *other than dredged or fill material*, into waters of the United States pursuant to section 402" whereas "the Army * * * ha[s] been vested with authority to permit discharges of dredged or fill material") (emphasis added).

Over 15 years later, both agencies confirmed, after notice and comment, that "EPA has *never* sought to regulate fill material under effluent guidelines." 67 Fed. Reg. 31,135 (2002) (emphasis added). They also noted in comments that "[i]f a specific discharge is regulated under Section 402, it would not also be regulated under Section 404, and vice versa." JA83a.

Under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984), these formal statements of agency policy are conclusive because they are a reasonable interpretation of the statute. So even if there were any ambiguity as to whether Section 402's "[e]xcept as provided in" clause makes the 402 and 404 programs mutually exclusive, the agencies' consistent interpretation is entitled to dispositive deference.

B. The Section 404(b)(1) Guidelines Rigorously Protect Water Quality.

The practical applications of the Section 402 and 404 programs also show why they are mutually exclusive. The Section 404 regulations were specifically designed to address the concerns applicable to fill material, as distinguished from other kinds of pollutants. Yet although the Corps is not required to apply EPA effluent limitations to the permitting of fill material, all relevant water quality

and environmental concerns are fully and rigorously protected by the Section 404 process.

Congress established a separate permitting scheme for fill material because it poses different environmental concerns from discharges of other pollutants. *See* JA47a (the "two regulatory programs were established by the CWA serving distinct objectives and goals"). As recognized in *Rapanos*,

> In contrast to the pollutants normally covered by the permitting requirement of [Section 402(a)], "dredged or fill material," which is typically deposited for the sole purpose of staying put, does not normally wash downstream * * *. *The Act recognizes this distinction by providing a separate permitting program for such discharges in [Section 404(a)].*

Rapanos, 547 U.S. at 744-45 (plurality).

The agencies set the division between the programs based on the effects of fill material to "ensure that discharges with similar environmental effects will be treated in a similar manner under the regulatory program." 67 Fed. Reg. 31,133 (2002). With fill material, "the principal environmental concern is the loss of a portion of the water body itself." 65 Fed. Reg. 21,292, 21,293 (2000). Thus, the Section 404(b)(1) Guidelines "go beyond * * * a water quality based approach to require numerous additional considerations before a section 404 permit may be issued." *Id.* They include some water quality standards required for a Section 402 permit, like the Section 307 toxic effluent limitation guidelines. *See, e.g.*, 40 C.F.R. § 230.10(b)(2). But they exclude standards that are not appropriate for fill material, such as Section 306 effluent limitations. Those limitations were not written with an intent to apply

them to fill material. *See* 67 Fed. Reg. 31,135 (2002). They are designed for liquid discharges with small amounts of solids in them and often place a cap on total suspended solids. The amounts of allowable particulates are so small that they are normally expressed in parts-per-million. *See, e.g.*, 40 C.F.R. § 440.104. Fill material could never meet such a standard.

Instead, the Section 404(b)(1) Guidelines contain their own rigorous standards that recognize the special concerns posed by fill material while broadly prohibiting harm to water quality, aquatic life, and human health, among many other things. *See, e.g.*, 40 C.F.R. § 230.10. For example, the Guidelines provide that "no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States." *Id.* § 230.10(c). To meet that standard, the Corps must make particular determinations regarding expected changes to salinity, contamination, and suspended particulates. *Id.* § 230.11. It may require the discharger to take particular actions to decrease the discharge's effect on water quality when these actions would be helpful. *Id.* §§ 230.71, 230.72. Unlike EPA when it reviews Section 402 permits, the Corps must also disapprove a permit if another alternative disposal site would be more environmentally sound. *Id.* § 230.10(a). And if EPA is still not satisfied after the Corps has applied all these water quality protections and a panoply of others, it can veto or modify the permit. 33 U.S.C. § 1344(c).

Here, it would have made no sense for the agencies to apply effluent limitations—with their stringent caps on suspended solids—to the proposed discharges of fill material. The tailings discharges

consist of non-toxic ground up earth and rock, and are thus chemically identical to normal fill discharges that indisputably can be, and routinely are, permitted by the Corps even under SEACC's interpretation. *See* JA93a (mine tailings "may have a slightly different physical form from the traditional rock and soil used as fill material, but [they] can have the same effect on the aquatic environment as those materials").

The Corps therefore reasonably concluded that it would be preferable for Coeur to use the tailings as fill in the lake, rather than obliterate an even greater area of wetlands using the same basic kind of material just so it could construct a monstrous open-air stack of tailings on top of that filled land. *See* Alaska Br. 47; Alaska Reply Br. 13. It would make no sense to require both a Section 404 and Section 402 permit simply because a fill discharge comes from a mine, when a discharge of the same chemical and physical composition with the same environmental effect would be regulated exclusively under Section 404 if it came from a different place. The tailings at issue are not some sort of toxic sludge, but rather are chemically and physically identical to the kind of indisputably lawful fill discharges that the Corps routinely permits throughout the nation.

In this case, EPA and the Corps worked together to recognize the appropriate permitting mechanism and then continued to work in tandem to provide a permit that requires Coeur to discharge the fill material in the most environmentally sound method possible. To reach this conclusion, the Corps examined 20 different factors in making its Section 404 determination. JA343a. And it added additional environmental protections at EPA's urging. *See, e.g.*,

ER476 (tailings capping requirement added to allay EPA concerns). The permit itself requires Coeur to use silt screens or other methods to "confine suspended particles * * * to a small area where settling can occur in Lower Slate Lake" and requires testing for toxins. JA276a.

Thus, water quality is fully protected by the Section 404 permit. Any short-term loss of aquatic life will not result from any water quality issues. *See* Alaska Br. 15-16. It will result from the tailings' physical attributes, which are the same as any other fill material. *Id.* The same loss of life would occur if the fill material came from a different source that is indisputably subject only to a Section 404 permit. And in the long term, the lake will provide a stronger aquatic habitat than it did previously. *Id.*

Moreover, to the extent that any particulates are discharged from Lower Slate Lake into downstream waters, that separate, subsequent discharge is subject to an EPA permit under Section 402 that meets all relevant EPA criteria. The agencies' division of responsibilities required Coeur to obtain (1) a Section 404 permit from the Corps for the fill material discharges *into* the lake impoundment and (2) a separate Section 402 permit from EPA for any non-fill discharges *from* the lake impoundment into downstream waters. There is no basis for upsetting that carefully-crafted administrative scheme.

CONCLUSION

For the foregoing reasons, and those in Alaska's previous briefs, the judgment below should be reversed.

Respectfully submitted,

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